

October 8, 2002

William F. Maher, Jr.
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Triennial Review, WCB Docket No. 01-338

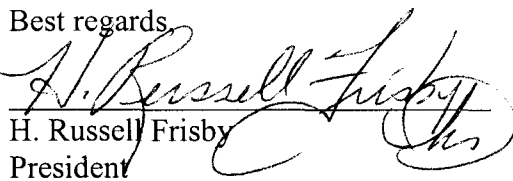
Dear Mr. Maher:

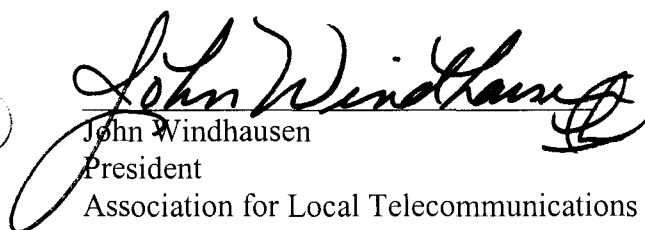
On behalf of the facilities-based competitive wireline industry, we hereby propose a test for determining at a granular level when the removal of inter-office transport UNEs would impair a competitive local exchange carrier.

We respectfully request that the Commission adopt this test in its Triennial Review as described in the attached document. This proposal employs the actual extent of transport competition between wire centers, rather than limiting itself to simply one end of a route (an approach taken by other proposals). An example illustrates the importance of this point. A passenger at Dulles Airport seeking to fly to San Francisco would not ask an airline: "Do any of your flights have seats available?" Instead, the question would be: "Do any of your flights to San Francisco have seats available?" Only the second question elicits useful information, the first is useless.

We welcome any questions you may have concerning this important matter.

Best regards,


H. Russell Frisby
President
CompTel


John Windhausen
President
Association for Local Telecommunications Services

cc: M. Brill
J. Carlisle
M. Carey
M. Dortch
J. Goldstein
D. Gonzalez
C. Libertelli
J. Miller
T. Navin
B. Olson
R. Tanner
J. Veach

A GRANULAR IMPAIRMENT TEST FOR INTER-OFFICE TRANSPORT UNES PROPOSED BY FACILITIES-BASED CLECS

- Pursuant to the 1996 Act, the Commission created principles to govern the TELRIC costing methodology, and directed the states to follow those principles when determining specific TELRIC prices (an approach recently upheld by the Supreme Court in Verizon). In similar fashion, the Commission should articulate principles in its Triennial Review proceeding to govern granular determinations of whether removal of an unbundled network element “impairs” a CLEC, and charge the states to use these principles when making such determinations.
- Principles applicable to all granular impairment tests:
 - The five-part impairment test previously utilized by the Commission in its UNE Remand Order should be reapplied in the Triennial Review proceeding to establish the UNEs that will continue to be made available until, and subject to, application of the granularity test set out here.
 - The extent to which CLECs are actually impaired by withdrawal of a UNE can only be assessed by examining the CLECs’ real market alternatives at a granular level.
 - The factors actually used by CLECs themselves to decide whether to purchase a UNE, or to provision that functionality, or to purchase it from a third party, are the critical considerations to be weighed when performing a granularity analysis.
 - An analysis of whether a CLEC can self-provision a UNE must utilize that CLEC’s likely volumes and its costs of capital, costs that would reflect the risks of sunk investments as well as the incumbents’ first-mover advantage.
 - Given that the competitive industry’s current-to-medium term cost of capital substantially exceeds that of the ILECs, self-provisioning cannot serve as a basis for a non-impairment finding by a state unless it can be performed at the UNE rate or less.
 - Granularity analyses should focus on the amount of alternative capacity, as well as its distribution among carriers, rather than simply

utilize the raw number of alternative providers. The distribution of capacity can be quantified using the HHI methodology and standards employed by the Antitrust Division of the Department of Justice, or other standard econometric techniques.

- In the event the Commission does permit states to use the raw number of alternative carriers as part of an impairment test instead of the amount and structure of overall capacity described above (and we strongly urge that it not do so), then the Commission should insure that such numbers are set at a level sufficient to insure meaningful competition, and that the viability of the competitive providers involved is clear and unquestioned.
- Any determination by a state that a UNE should be withdrawn must be accompanied by a transition period of no less than thirty-six months or the remaining length of existing interconnection agreements (including any agreements currently in the Section 252 arbitration/approval process), whichever is longer. At the end of the transition period CLECs would be entitled to purchase the UNE as a service from the ILEC at a non-TELRIC retail rate to be determined by the state. In the case of inter-office transport, that rate should not exceed the price of special access as of the time the Commission's order becomes effective.
- Where a state holds that a UNE fails the impairment test and a CLEC chooses to move its traffic off the UNE, the ILEC shall be obligated to insure that the traffic is migrated without any impact on end user service. Alternatively, if a CLEC chooses to continue using ILEC service at a non-TELRIC rate following the end of a UNE's availability, the ILEC is prohibited from imposing any "conversion" conditions or costs, or objecting to any combination of UNEs and tariffed services entailed by the CLEC's choice (i.e., in the case of transport UNEs, CLECs would be free to replace all or a portion of UNE transport with any combination of facilities whatever, which would include, but not be limited to, combinations of self-provisioning, third-party provisioning, purchases of retail or wholesale ILEC services, purchases pursuant to Section 271(c)(1)(B), etc.).

- Principles applicable to an inter-office transport granularity test:
 - Granular examination of whether CLECs have meaningful market substitutes for interoffice transport has to be conducted at the level of specific transport routes (i.e., the inquiry must examine whether there are actually alternative sources of transport from one particular ILEC wire center to another ILEC wire center for particular levels of transport (DS-1, DS-3, OCN, etc.)). Furthermore, the presence of alternative transport providers at a single wire center (which is the basis for a test proposed by BellSouth and Time Warner Telecom) offers no indication of whether those alternatives actually extend to the specific wire centers a CLEC needs to reach, or offer the particular wholesale transport service needed by the CLEC.*
 - Alternative transport routes would have to meet the following requirements in order to be given any weight in a granularity analysis:
 - (1) Competitive carriers would have to actually offer wholesale transport for the routes and service levels at issue, have adequate capacity to serve existing and foreseeable demand, and be financially solvent;
 - (2) CLECs would have to be able to reach the alternative providers for a specific route in an economically viable and technologically reliable manner, including, but not limited to, cross-connects of reasonable reach and cost (whether self-provisioned, third-party provisioned, or ILEC-provisioned), or via multi-strand non-ILEC fiber terminated by competitive fiber providers on a fiber distribution frame within a wire center, or via muxing at a wire center, etc.;
 - (3) ILECs or other carriers providing loop or any other “last mile” facilities used in conjunction with alternative transport routes would have to agree to participate in multi-vendor “end-to-end” testing adequate to assure service quality; and,

* A simple example makes this point. A passenger at Dulles Airport seeking to fly to San Francisco would not ask an airline: “Do any of your flights have seats available?” Instead, the question would be: “Do any of your flights to San Francisco have seats available?” Only the second question elicits useful information, the first is pointless.

(4) The petitioning ILEC would have to offer robust guarantees that current transport UNE traffic would be migrated to competitive carriers or alternative ILEC services without service disruptions at a CLEC's request. As noted above, CLECs could replace all or a portion of UNE transport with any combination of services and facilities, including self-provisioning, third-party provisioning, purchases of retail or wholesale ILEC services, purchases pursuant to Section 271(c)(1)(B), etc.

- An ILEC will be deemed to have met its burden of proof concerning impairment on particular inter-office transport routes wherever the HHI index for transport over a specific route is less than the Antitrust Division's standard for concentrated markets. If the Commission declines to adopt a standard based on overall capacity and distribution, then an ILEC should be deemed to have met its burden of proof where it can demonstrate the existence of four alternative transport providers each meeting the qualifications set forth above.
- Procedural framework for the application of granularity tests:
 - States would conduct granularity proceedings upon petition by ILECs. The filing of a petition would not relieve an ILEC of its obligation to continue providing the UNEs being challenged.
 - States can structure their granularity proceedings as they deem most efficient (i.e., they could create "filing windows" during which impairment petitions would have to be filed, and determine the length of time before subsequent windows would open). Furthermore, they could consolidate petitions as they see fit.
 - States would impose the burden of proof upon the petitioning ILEC. Concerning inter-office transport, for example, the ILEC knows which wholesale transport providers actually serve both ends of transport routes between the incumbent's wire centers.